

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
)	
EAGLEVIEW TECHNOLOGIES, INC.)	File No. 20010316ABB
)	
For Renewal of Multipoint Distribution Service)	
Station WMH805, Jacksonville, Florida)	
)	
and)	
)	
Petition for Declaration of Forfeiture filed by)	
American Telecasting and Development, Inc.)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 2005

Released: January 10, 2005

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On May 15, 1997, American Telecasting of Jacksonville, Inc. (ATEL) filed a petition for declaration of forfeiture of license against Eagleview Technologies, Inc. (Eagleview), licensee of Multipoint Distribution Service (MDS)¹ Station WMH805, Jacksonville, Florida.² ATEL held the MDS Basic Trading Area ("BTA") authorization that includes Jacksonville and argued that it had the exclusive right to file a long-form application to operate wireless cable television systems in those portions of the Jacksonville BTA where the service area of a forfeited incumbent has been merged with the BTA pursuant to section 21.392(c) of the Commission's rules.³ Eagleview filed an opposition to ATEL's petition on June 11, 1997.⁴ Also, on August 1, 2001, Bell South Wireless Cable, Inc., the successor-in-

¹ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing MDS and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*MDS/ITFS R&O & FNPRM*). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. In the future, we will no longer refer to these services as MDS and ITFS.

² American Telecasting of Jacksonville, Inc., Petition for Declaration of Forfeiture of License, File Nos. 20010316ABB and BPMD-9253354, filed May 15, 1997 (Forfeiture Petition).

³ 47 C.F.R. § 21.932(c).

⁴ Eagleview Technologies, Inc., Opposition to Petition for Declaration of Forfeiture of License, File Nos. BRMD-20010316ABB and BPMD-9253354, filed June 11, 1997 ("Opposition").

interest to ATEL, filed a petition to deny against the captioned renewal application filed by Eagleview.⁵ For the reasons discussed below, we deny the Forfeiture Petition and Petition to Deny.

II. BACKGROUND

2. Eagleview acquired the license for Station WMH805 (“the Station”) via assignment from Communications Innovations Corporation after the Commission granted its consent to the transaction on December 4, 1995.⁶ At the time of the assignment, the license was due to expire on May 1, 2001.⁷

3. On May 15, 1997, ATEL filed a petition for declaration of forfeiture of license regarding the Station.⁸ ATEL contended that Eagleview had voluntarily caused the removal or alteration of the facilities of the Station in a way that rendered the station not operational for a period of thirty days or more.⁹ ATEL alleged that its physical investigation of the station’s authorized transmitter site on March 21, April 8, and May 2, 1997, revealed that the station transmitter was not connected to a power source or antenna and that the coaxial cable leading from the transmission antenna terminated several feet short of the transmitter, implying that a section of coaxial cable had been removed.¹⁰ In addition, ATEL stated that, on a periodic basis during the period March 21-May 2, 1997, Mr. Mark T. Hopkins, ATEL’s Southeast Regional Engineer, used frequency monitoring equipment to monitor MDS Station WMH805 and detected no measurable signal on the station assigned frequency, MDS Channel 1.¹¹ ATEL therefore urged the Commission to declare the license for Station WMH805 forfeited.

4. On June 11, 1997, Eagleview filed its Opposition.¹² The Opposition acknowledged that Section 21.44 of the Commission’s rules¹³ provides for forfeiture if an MDS station’s facilities are removed or altered voluntarily so that the station is not operational for more than thirty days but stated that the facilities of Station WMH805 had not been removed and that the disconnection of the station’s transmitter was done by, or at the behest of, the site owner as a result of a dispute concerning workers compensation insurance.¹⁴ The Opposition acknowledged that the station was off the air for a period of “a few months” while the insurance matter was being settled but stated that the facility returned to the air on June 3, 1997, and was still on the air at the time the Opposition was filed.¹⁵

⁵ Petition to Deny (filed Aug. 1, 2001) (Petition to Deny).

⁶ See File No. BALMD-9550181 (granted Dec. 4, 1995).

⁷ See File No. BPMD-9253354 (granted Oct. 14, 1993).

⁸ Forfeiture Petition.

⁹ *Id.* at 2-3.

¹⁰ *Id.*

¹¹ *Id.* at 2-3. A declaration by Mr. Hopkins is attached to the Forfeiture Petition. See *id.*, Exhibit A (Transmission Survey Report).

¹² Opposition. Eagleview acknowledged that, pursuant to Section 21.30 and 1.45 of the Commission’s rules, an opposition was due by May 29, 1997, but filed a motion to accept a late filed opposition. Eagleview Motion to Accept Late Filed Opposition (filed Jun. 11, 1997). While we do not condone Eagleview’s failure to file a timely opposition, we grant its motion and consider its opposition in the interest of having a complete factual record in this proceeding.

¹³ 47 C.F.R. § 21.44.

¹⁴ Opposition at 1-2. In support of this assertion, Eagleview attaches a sworn statement of William Trozzo. See *id.*, Exhibit A (Trozzo Declaration). Neither the Opposition nor the Trozzo Declaration characterizes the professional relationship, if any, between Eagleview and Mr. Trozzo.

¹⁵ Opposition at 2.

5. The Opposition further acknowledged that Section 21.303(d) requires forfeiture if a station remains silent for a period of twelve consecutive months.¹⁶ The Opposition asserted that “ATEL has not alleged, nor could it, that Station WMH805 was silent for such a period.”¹⁷

6. On June 23, 1997, ATEL filed its reply.¹⁸ ATEL emphasized that not only was the coaxial cable between the station’s transmitter and antenna disconnected but that several feet of the cable were missing, so that the cable could not be connected.¹⁹ ATEL stated it was clear that someone had removed or altered the equipment and that such a state of affairs requires the automatic forfeiture of the station authorization under Section 21.44(a)(3).²⁰

7. ATEL also argued that there is no evidence on the record that Eagleview has complied with Section 21.303(d).²¹ ATEL contended that “noticeably absent” from Eagleview’s Opposition was any specific representation that Station WMH805 has continually provided service in compliance with Section 21.303(d) since a certification of completion of construction for the station was filed on September 27, 1994.²² ATEL argued that, in light of the results of its inspection of the station, it is likely that Eagleview has not complied with Section 21.303(d).²³ ATEL contended that this conclusion was supported by the fact that Eagleview never filed an MDS annual report for its station, in repeated violation of Section 21.911 of the Commission’s rules.²⁴

8. On August 19, 1997, BellSouth Wireless Cable, Inc. (“BellSouth”) filed a notification that, on August 12, 1997, ATEL consummated the assignment of its MDS authorization for the Jacksonville BTA to BellSouth.²⁵ As the current holder of the Jacksonville BTA authorization, BellSouth stated that it was replacing ATEL as the petitioner in this proceeding.²⁶

9. On August 1, 2001, Bell South filed the Petition to Deny against Eagleview’s renewal application.²⁷ Bell South incorporated by reference the allegations in the Forfeiture Petition.²⁸ Bell South also alleged that Eagleview had misrepresented facts by answering in the negative the question, “Has there been removal of equipment or alteration of facilities so as to render the station not operational?”²⁹

¹⁶ *Id.* at 1.

¹⁷ *Id.*

¹⁸ ATEL Consolidated Opposition to Motion to Accept Late Filed Opposition and Reply to Opposition to Petition for Declaration of Forfeiture of License (filed Jun. 23, 1997) (ATEL Reply).

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2-3, *citing* 47 C.F.R. § 21.44(a)(3).

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.*

²⁴ *Id.*, *citing* 47 C.F.R. § 21.911.

²⁵ Notification of Substitution of BellSouth Wireless Cable, Inc. for American Telecasting of Jacksonville, Inc. in the Captioned Petition for Declaration of Forfeiture of License (filed Aug. 19, 1997).

²⁶ *Id.*

²⁷ Petition to Deny.

²⁸ *Id.* at 2 n.2.

²⁹ *Id.* at 4.

III. DISCUSSION

10. We find that Bell South's allegations are insufficient to justify declaring Eagleview's license for Station WMH805 to be forfeited. Section 21.44(a)(3) of the Commission's Rules requires automatic forfeiture of a station license upon "[t]he voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more."³⁰ The express language of Section 21.303(d) of the Commission's Rules requires the licensee to take one of three actions "if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed. . . ."³¹ The three options are (1) submitting its station license for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver pursuant to Section 21.303(d)(3).³² Significantly, prior to the adoption of Section 21.303(d), the Commission's Rules did not require licensees to relinquish unused frequencies.³³ The Commission found that, "[i]n addition to preventing others from using the spectrum, this results in the Commission being unable to discern when spectrum is not being used or is being underutilized."³⁴ Therefore, the Commission adopted Section 21.303(d) to ensure the efficient use of the spectrum by requiring licensees to submit licenses covering unused spectrum to the Commission for cancellation.³⁵

11. We conclude that Bell South has failed to establish that there was a voluntary removal of equipment that would trigger Section 21.44 of the Commission's Rules. Eagleview denied that it had removed or voluntarily altered its facilities in a way that would trigger the forfeiture provisions of section 21.44 by rendering the Station not operational for more than thirty days.³⁶ Eagleview did not deny ATEL's assertion that a section of cable that connected the Station's antenna to its transmitter had been disconnected. Instead, Eagleview asserted that such removal was not "voluntary" because it was removed by the site owner as a result of a dispute concerning workers compensation insurance.³⁷ Under those circumstances, even assuming that the temporary disconnection of a cable constitutes a "removal or alteration of the facilities" for purposes of Section 21.44, such action was not the result of Eagleview's voluntary action. For that reason, we do not find that Eagleview has taken any actions that would trigger forfeiture of its license pursuant to Section 21.44.

12. Furthermore, the record before us does not establish that the Station has been inoperative for a period of twelve consecutive months in violation of Section 21.303 of the Commission's Rules. Eagleview acknowledged that Section 21.303(d) requires forfeiture if a station remains silent for a period of twelve consecutive months³⁸ but asserted that "ATEL has not alleged, nor could it, that Station WMH805 was silent for such a period."³⁹ While ATEL provided evidence that Station WMH805 did not operate on specific dates, ATEL did not attempt to provide evidence that the Station had been dark for a twelve month period. As the petitioners, the burden was on ATEL and Bell South to demonstrate that

³⁰ 47 C.F.R. § 44(a)(3).

³¹ *Id.*

³² *See* 47 C.F.R. § 21.303(d)(1)-(3).

³³ *See* Revision of Part 21 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 82 (1987).

³⁴ *Id.*

³⁵ *See id.*

³⁶ Opposition at 1-2.

³⁷ *Id.*

³⁸ Opposition at 1.

³⁹ *Id.*

Eagleview had forfeited its license. Pursuant to Section 21.30 of the Commission's Rules, a petition to deny must contain "specific allegations of fact . . . , which shall be supported by affidavit of . . . persons with personal knowledge thereof, and which shall be sufficient to demonstrate . . . that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest. . . ." ⁴⁰ In other services, the Commission has noted that sporadic monitoring of a frequency is insufficient to establish that a station has permanently discontinued operation. ⁴¹ We believe the same logic applies in this service. ⁴² Accordingly, we conclude that ATEL and Bell South have failed to demonstrate a violation of Section 21.303.

13. Finally, we reject Bell South's allegations that Eagleview misrepresented facts when it answered the question "Has there been removal of equipment or alteration of facilities so as to render the station not operational?" in the negative. While the answer appears to have been incorrect, an essential element of misrepresentation is an intent to deceive the Commission. ⁴³ When accurate information previously supplied by a party is a matter of open Commission record, "an intent to categorically misrepresent . . . is difficult to find." ⁴⁴ In this case, Eagleview had previously admitted that Station WMH805 had suffered an interruption of service in opposing the Forfeiture Petition. Accordingly, while we remind Eagleview of its duty to accurately answer all Commission inquiries, we conclude that no intent to deceive the Commission is present. We therefore deny the Forfeiture Petition and Petition to Deny.

IV. CONCLUSION AND ORDERING CLAUSES

14. For the reasons stated above, we conclude that Bell South has failed to demonstrate that Eagleview has removed or altered its equipment in a way that would trigger the forfeiture provisions of Section 21.44, or that Eagleview has failed to use the Station to provide service for a twelve month period, thus triggering the forfeiture provisions of Section 21.303(d) of the Commission's Rules. We therefore deny the Forfeiture Petition and Petition to Deny.

15. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 21.44 and 21.303(d) of the Commission's Rules, 47 C.F.R. §§ 21.44 and 21.303(d), that the "Petition for Declaration of Forfeiture" filed by American Telecasting of Jacksonville, Inc., on May 15, 1997 **IS DENIED**.

16. **IT IS FURTHER ORDERED**, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d) and Section 21.30 of the Commission's Rules, 47 C.F.R. § 21.30, that the Petition to Deny filed by Bell South Wireless Cable, Inc. on August 1, 2001 **IS DENIED**.

17. **IT IS FURTHER ORDERED**, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d) and Section 21.30 of the Commission's Rules, 47 C.F.R. § 21.30, that the licensing staff of the Broadband Division **SHALL PROCESS** the application for renewal of license filed by Eagleview Technologies, Inc. on March 16, 2001 (File No. 20010316ABB) in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

⁴⁰ 47 C.F.R. § 21.30(a)(3).

⁴¹ See Brookfield Development, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 14385, 14391 ¶ 18 (2004) Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999).

⁴² See Gary Golden, *Memorandum Opinion and Order*, 19 FCC Rcd 21117, 21125 ¶ 14 (WTB BD 2004).

⁴³ Fox River Broadcasting, Inc., *Memorandum Opinion and Order*, 93 FCC 2d 127, 129 (1983).

⁴⁴ Superior Broadcasting of California, *Decision*, 94 FCC 2d 904, 909 (Rev. Bd. 1983) (citing Vogel-Ellington Corp., *Decision*, 41 FCC 2d 1005, 1010 (Rev. Bd. 1973)).

18. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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